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Decision 04-09-027 September 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In Touch Communications, Inc. And Inflexion California Communications Corp., For The Sale And Purchase, Respectively Of The Customer Base, Operating Authorities And Other Assets.	Application 03-11-011 (Filed November 10, 2003)
Inflexion California Communications Corp., For A Certificate Of Public Convenience And Necessity To Provide Resold And Limited Facilities-Based Competitive Local Exchange Service Throughout The Service Territories Of SBC California, Inc., Verizon California Inc., Roseville Telephone Company, And Citizens Telecommunications Company Of California, Inc.; And Resold And Facilities-Based Interexchange Service.	Application 03-11-013 (Filed November 19, 2003)

ORDER DENYING REHEARING OF DECISION 04-05-033

In Decision 04-05-033 (the Decision), we denied Inflexion California Communications Corp. 's applications for a Certificate of Public Convenience and Necessity (CPCN) to provide competitive local exchange service and interexchange service, and for approval to acquire the assets of In Touch Communications Inc. pursuant to Public Utilities Code § 851. We concluded that it is not in the public interest to grant these applications because Inflexion failed to establish that its management team is qualified to serve California

customers. The factual basis for that conclusion is discussed in detail in the Decision, and we will not repeat that discussion here.

Inflexion has filed an application for rehearing. Inflexion does not dispute any of the facts on which we relied, and nothing in its rehearing application persuades us that we erred. Accordingly, the request for rehearing will be denied.

Inflexion's primary contentions are that there is insufficient evidentiary support for the Decision and that due process requires the Commission to hold an evidentiary hearing. We addressed these arguments in the Decision, and will address them again here only briefly.

I. Evidence to Support the Decision

We concluded that it is not in the public interest to grant Inflexion a CPCN at this time because Inflexion failed to establish that its management is qualified to serve California customers. (Decision, p. 2 & p. 15 (Conclusion of Law 1).) There is ample evidence to support this conclusion.

As explained in the Decision, two of Inflexion's senior executives were the founders and former top managers of Nntegrity Telecontent Services, Inc. (Ntegrity). Dwayne Goldsmith was President [until August 2001] and Keith Machen Vice-President and General Counsel. Ntegrity was fined $400,550 by the Pennsylvania Public Utility Commission (PPUC) for slamming customers in 1998 and 1999 and for failing to cooperate with the Commission staff's requests for information related to customer complaints. The PPUC issued a formal complaint, and Mr. Machen was personally involved in lengthy settlement negotiations with the PPUC, which did not produce a settlement. Ntegrity failed to appear at the hearing, and failed to pay the fine.

Inflexion does not dispute any of these facts — in fact, it expressly admits them in its application for rehearing (p. 4.) Rather, it contends that there is "no nexus" between these facts and the decision to deny a CPCN to Ntegrity because these facts do not prove that Messrs. Machen and Goldsmith were personally responsible for Ntegrity's actions. The nexus that Inflexion fails to recognize is that Ntegrity's history of slamming customers and failing to cooperate with state regulators, and to pay the fine, is a red flag. It raises a serious concern about whether this Commission should allow a new company run by two of the same

individuals to serve California customers. Moreover, Inflexion stated in this proceeding that it intends to serve customers that are "credit impaired and unable to meet credit or deposit requirements of other carriers." (See Decision, p. 5.) Most such customers are relatively unsophisticated, and in light of our experience with cramming and slamming, we are particularly concerned about protecting such customers. (See, e.g., *Investigation into the operations, practices, and conduct of Qwest Communications Corp. et al.,* D.02-10-059 (finding that slamming by Qwest and its agents disproportionately impacted ethnic communities and fining Qwest over $20 million.)

Inflexion faults us for not trying to determine whether Messrs. Goldsmith and Machen are "personally guilty of intentional wrongdoing" or whether they could be found personally liable for the wrongful acts of Ntegrity. But it is not necessary, for purposes of evaluating Inflexion's CPCN application, to determine the precise degree of personal legal responsibility borne by Messrs. Goldsmith and Machen. As Verizon sensibly pointed out earlier in this proceeding, "Companies are run by people, and when a company commits wrongdoing, the people that run the company should be held accountable." (Reply Comments of Verizon on Draft decision of ALJ Thomas, p. 3.) It is reasonable to infer that Messrs. Goldsmith and Machen, as officers of Ntegrity, bear some measure of responsibility for Ntegrity's slamming customers in 1998 and 1999, and for Ntegrity's failure to cooperate with the Pennsylvania PUC's investigation of those acts.

In an apparent attempt to raise an inference that Mr. Goldsmith bears no responsibility for Ntegrity's slamming of Pennsylvania customers, Inflexion states in its application for rehearing that Mr. Goldsmith resigned as CEO of Ntegrity three years ago. Assuming that Mr. Goldsmith left the company in 2001, this fact does not alter our conclusion. Inflexion does not dispute that Mr. Goldsmith was CEO when the slamming occurred in 1998 and 1999, and when Ntegrity failed to cooperate with the PPUC's subsequent investigation. The formal complaint issued on November 24, 1999. (See the Pennsylvania Decision, attached to Inflexion's Supplement to Application.) Nor does Inflexion dispute that Mr. Machen was Vice President and General Counsel during those

events and afterwards, when Ntegrity failed to appear at the hearing, resulting in a default judgment against it.

Our decision not to grant a CPCN to a company run by these same individuals at this time is supported by these undisputed facts and inferences reasonably drawn from them. (See *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal. 3d 845, 864.) At the same time, our decision permits Inflexion to reapply for a CPCN in two years, accompanied by a showing that its management team is qualified to provide service to California customers.

II. Need for Evidentiary Hearing

Inflexion argues that Public Utilities Code § 1005 provides it with an "independent statutory right to a hearing on all factual issues that are material to its case." As we explained in the Decision, Inflexion was not entitled to a hearing because it did not identify any disputed facts material to the Decision. Nor did it "meet its threshold burden of tendering evidence" (Decision, p. 11 (quoting *Costle v. Pacific Legal Found.* (1980) 445 U.S. 198, 214); see also *State of Cal. ex rel. Lockyer v. FERC* (9th Cir. 2003) 329 F.3d 700, 709-713 (FERC's expedited approval of a corporate reorganization of PG&E Corporation's subsidiaries did not deprive the petitioners of the opportunity to be heard within the meaning of the Federal Power Act or the Fifth Amendment's Due Process Clause); *Pacific Gas & Electric Co. v. FERC* (9th Cir. 1984) 746 F.2d 1383, 1386 (no hearing required when there has been no showing that material facts are in dispute); *Sierra Ass'n. for Environment v. FERC* (9th Cir. 1984) 744 F.2d 661, 664 (no trial-type hearing required when a party participated in notice-and-comment procedures and failed to point to specific disputed facts). Once again, due process does not require a hearing that serves no useful purpose. (Decision at pp. 10-11 (quoting *Los Angeles v. Public Utilities Com.* (1975) 15 Cal. 3d 680, 703).)

III. Reliance on *Res Judicata*

Inflexion also contends that the Decision's "reliance on the doctrine of *res judicata* to preclude Inflexion and its management team from presenting evidence in support of the applications" deprived Ntegrity of due process. (Application for rehearing, p. 9.)

Inflexion makes too much of our comment that the PPUC decision is *res judicata*. (See Decision, p. 13.) Due process requires notice and an opportunity to be heard on material issues, and Inflexion was afforded both. Due process does not require that we allow Inflexion an evidentiary hearing to make a showing of "mitigating factors that the PPUC did not consider when it issued its default judgment against Ntegrity." (Application for rehearing, p. 9.) As explained in the Decision and in this order, the material facts concerning Ntegrity's history that we have relied upon are undisputed and provide ample grounds for denial of the CPCN based on lack of fitness of the applicants. Among them are PPUC's findings of slamming, non-cooperation by Ntegrity, and non-payment of the fine. Even if Messrs. Goldsmith and Machen have mitigating evidence concerning the Pennsylvania slamming case that was not presented to the PPUC (and they have not stated what the nature of that evidence is), due process does not require that we conduct an evidentiary hearing on the facts and circumstances of the Pennsylvania slamming case.

Accordingly,

IT IS ORDERED that:

1. Inflexion's application for rehearing of Decision 04-05-033 is denied.
2. These proceedings are closed.

This order is effective today.

Dated September 2, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners